Filed 9/12/16 Galardi Group Franchise and Leasing v. Barstow Town Square CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

GALARDI GROUP FRANCHISE AND LEASING, LLC,

Plaintiff and Respondent,

v.

BARSTOW TOWN SQUARE, LLC,

Defendant and Appellant.

E064289

(Super.Ct.No. CIVDS1417503)

OPINION

APPEAL from the Superior Court of San Bernardino County. Donna G. Garza, Judge. Dismissed.

Law Office of Stephen P. Robinson and Stephen P. Robinson for Defendant and Appellant.

David M. Cohen for Plaintiff and Respondent.

In 2001, the then-owners of a Barstow shopping center leased space for a Der Wienerschnitzel restaurant to the then-holders of a Der Wienerschnitzel franchise. In the

lease, they agreed to give "Franchisor" — defined as "Der Wienerschnitzel" — copies of any notice that they gave to the franchisees.

Our appellate record does not reveal who owned and franchised the Der Wienerschnitzel brand in 2001. As of 2006, however, an entity called Galardi Group Franchise Corp. (Franchise) was in charge of granting franchises for the brand (which by then had been shortened slightly to "Wienerschnitzel"), while an entity called Galardi Group Franchise & Leasing, LLC (Leasing) was in charge of overseeing a franchise after it was granted. Both Franchise and Leasing were owned by a third entity, called Galardi Group, Inc. (Group).

Thus, in 2006, when the original franchisees of the Barstow Wienerschnitzel sold their business to one Rosa Jun, Franchise and Leasing entered into a new franchise agreement with Jun.

In April 2014, Barstow Town Square, LLC (Barstow) bought the shopping center. In July 2014, Barstow gave Jun a 30-day notice to perform or quit; it did not send a copy of the notice to Group, Franchise, or Leasing. It filed an unlawful detainer against Jun and obtained a judgment allowing it to evict her.

Leasing then brought this action against Barstow for breach of contract. The trial court granted a preliminary injunction, enjoining Barstow from physically evicting Jun. Barstow appeals. It argues (among many other things) that Leasing does not have the rights of "Franchisor" or "Der Wienerschnitzel" under the lease.

We find no error. Hence, ordinarily, we would affirm. After this court issued its tentative opinion and set oral argument (see Ct. App., Fourth Dist., Div. Two, Internal Operating Practices & Proc., VIII, Tentative opinions and oral argument), however, Barstow notified us that it had settled with Leasing and asked us to dismiss the appeal. Although we will grant the request for dismissal (see *Neary v. Regents of University of California* (1992) 3 Cal.4th 273, 285), in light of the tardiness of the request (see Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2016) ¶ 5:64) and the ultimate lack of merit of the appeal, we issue this opinion expressing our views on the issues. (*Lara v. Cadag* (1993) 13 Cal.App.4th 1061, 1065-1066.)

I

FACTUAL BACKGROUND

The following facts are taken from the evidence introduced in support of and in opposition to the motion for a preliminary injunction. We disregard any evidence to which the trial court sustained an objection.

Group has two subsidiaries — Franchise and Leasing. These three entities collectively own the trade name "Wienerschnitzel"; they also franchise and oversee the operation of Wienerschnitzel stores. In general, Franchise is responsible for initially granting a franchise; Leasing is responsible for interacting with the franchisee thereafter.

Barstow owns a shopping center. In 2001, Barstow's predecessors in interest entered into a lease (Lease) with Anil and Monica Mohan for a term of 25 years for the construction and operation of a Der Wienerschnitzel restaurant.

The Lease stated: "Landlord acknowledges that Tenant is also the Franchisee under a Franchise Agreement with Der Wienerschnitzel (Franchisor)." (Capitalization altered.) It then provided that:

" . . . [T]he Landlord agrees to furnish Franchisor with copies of any and all letters and notices sent to Tenant pertaining to this lease and the premises, at the same time that such letters and notices are sent to Tenant . . . ." (Capitalization altered.)

" . . . Franchisor shall have the right to enter the Premises to make any modifications necessary to protect the Franchisor's Proprietary marks or to cure any default under the Lease . . . ." (Capitalization altered.)

" . . . Franchisor shall have the option . . . to assume Tenant's occupancy rights, duties and obligations . . . upon Tenant's default or termination under this Lease; provided that as a condition to said assumption Franchisor shall cure Tenant's default." (Capitalization altered.)

The Lease did not provide any address or other contact information for Der Wienerschnitzel.

The Lease also stated: "Tenant may not assign this Lease[] without the prior written consent of Landlord, which consent may not be unreasonably withheld or denied." (Capitalization altered.) "Landlord shall not withhold its consent to an assignment by Tenant, provided Tenant has obtained written consent to such assignment from Der Wienerschnitzel[] (Franchisor) and so long as the proposed assignee (i) agrees in writing to be bound by all of the terms and conditions contained herein . . . ; (ii)

demonstrates, to Landlord's reasonable satisfaction, prior experience in operating a full service restaurant; (iii) demonstrates, to Landlord's reasonable satisfaction, adequate financial resources to meet the obligations of Tenant under this Lease; and (iv) demonstrates[,] to Landlord's reasonable satisfaction, the ability to reinvest sufficient capital from time to time in order to maintain the quality, level of service, character and condition of the business operated on the Premises." (Capitalization altered.)

Similarly, the Lease stated: " . . . Tenant may not sublet all or any portion of the Premises, without the prior written consent of Landlord, which consent may not be unreasonably withheld or denied . . . ." (Capitalization altered.) "Landlord shall not withhold its consent to a subletting by Tenant, provided Tenant has obtained written consent to such subletting from Der Wienerschnitzel[] (Franchisor) and so long as the proposed subtenant (i) agrees in writing to be bound by all of the terms and conditions contained herein . . . ; and (ii) demonstrates[,] to Landlord's reasonable satisfaction, financial resources to meet the obligations of Tenant under this Lease." (Capitalization altered.)

In 2006, the Mohans sold their restaurant to one Rosa Jun. With the consent of Barstow's predecessors in interest, the Mohans assigned the Lease to Jun.

Franchise, Leasing, and Jun entered into a new franchise agreement (Franchise Agreement). In it, Franchise was defined as "Franchisor." Franchise granted Jun a license to use Wienerschnitzel trademarks and proprietary information. Franchise was to provide Jun's initial training.

Leasing, on the other hand, was defined as "Service LLC." Leasing was to provide Jun with continued training, marketing and promotional services and an accounting system. Leasing had to approve Jun's advertising. Leasing had control over Jun's menu, décor, and hours. Jun was to pay franchise fees to Leasing.

In April 2014, Barstow acquired the shopping center and assumed the Lease.

On July 1, 2014, Barstow gave Jun a 30-day notice to perform or quit. It identified the following defaults:

1. Failure to deliver a statement of gross sales for 2013;

2. Failure to pay percentage rent due in 2013;

3. Failure to deliver copies of quarterly state sales tax for the preceding 12 months;

4. Failure to submit an audited report of gross sales and percentage rent for 2012 and 2013.

Barstow did not send the 30-day notice to Group, Franchise, or Leasing.

According to Barstow's attorney, he did try to send a copy of the 30-day notice to "Der Wienerschnitzel." To that end, he searched the Secretary of State's website. However, he found only two entities with "Der Wienerschnitzel" in their names, and both were suspended.[1]

---

[1] Sometime between 2001 and 2014, the "Der" had been "dropped." However, even if Barstow's attorney had searched the Secretary of State's website for just plain "Wienerschnitzel," the results would not have included Group, Franchise, or Leasing.

Leasing's attorney, however, contradicted Barstow's attorney. He testified that, when he first spoke to Barstow's attorney, in November 2015, Barstow's attorney was not aware of the provision of the Lease requiring notice to the Franchisor. Also, Barstow's attorney filed a printout of his search results from the Secretary of State's website; they were dated December 2014, when this action was filed, rather than July 2014, when the 30-day notice was given.

Barstow's attorney did not do a Google search; if he had, it would have revealed that Group owns the name "Wienerschnitzel." He also did not ask Jun about who the franchisor was.

In August 2014, Barstow filed an unlawful detainer against Jun. In October 2014, the trial court entered judgment in the unlawful detainer in favor of Barstow and against Jun.[2]

Sometime on or before November 5, 2014, Jun informed Leasing of the unlawful detainer judgment. Leasing contacted Barstow and protested that it had not been given any notice of or any opportunity to cure Jun's defaults. Leasing and Barstow agreed that the 30-day notice would be deemed served on Leasing as of November 24, 2014, and that Barstow would not lock Jun out until December 23, 2014.

---

[2] After entry of the judgment, the attorney who now represents Leasing in this action appeared for Jun in the unlawful detainer; he brought a motion on her behalf for relief from forfeiture.

On December 17, 2014, Leasing sent Barstow a "cure package," including back rent, which — at least in Leasing's view — cured all of the defaults identified in the 30-day notice.[3] Nevertheless, Barstow took the position that it was entitled to lock Jun out after December 23, 2014.

II

PROCEDURAL BACKGROUND

In November 2014, Leasing filed this action, asserting causes of action for breach of contract and specific performance.[4]

On December 22, 2014, Leasing filed an ex parte application for a temporary restraining order, along with a motion for a preliminary injunction. It argued that Barstow had breached its contractual duty to give notice to Leasing, which was an intended third party beneficiary of the Lease. The trial court granted a temporary restraining order and set a hearing on the motion.

---

[3] Barstow asserts that "[Leasing] never cured Jun's default." However, it does not cite any *evidence* to that effect. A copy of the entire cure package is in the record; Barstow does not claim that anything that it specified in the 30-day notice was absent from the cure package.

In the trial court, Barstow did not take any position as to whether Leasing had cured the default; it claimed that it "ha[d] not completed its review" of the cure package, and that the adequacy of the cure package was "irrelevant."

[4] As Barstow points out, specific performance is a remedy, not a distinct cause of action. (*Green Valley Landowners Association v. City of Vallejo* (2015) 241 Cal.App.4th 425, 433, fn. 8, and cases cited.) Accordingly, any discussion of contract law principles in this opinion will apply equally to both causes of action.

In opposition to the motion, Barstow argued: (1) Leasing had no standing to enforce any of the terms of the Lease because it was a "stranger to the contract"; (2) the unlawful detainer judgment barred Leasing's claims as a matter of res judicata or collateral estoppel; (3) Leasing had waived its claims by failing to identify itself as "Der Wienerschnitzel" and by failing to provide its contact information; (4) a preliminary injunction would essentially provide Leasing with specific performance, even though Leasing was not entitled to specific performance[5]; (5) the balance of harms favored Barstow; and (6) Leasing had an adequate legal remedy.

On March 12, 2015, after hearing argument, the trial court granted the motion. It issued a preliminary injunction prohibiting Barstow from attempting to evict or to lock out Jun or anyone else from the premises. The preliminary injunction provided, "This Preliminary Injunction is effective upon the filing by [Leasing] of an undertaking in the sum of $11,015 . . . ." On March 27, 2015, Leasing filed the required undertaking.

III

REVIEW OF A PRELIMINARY INJUNCTION

"In deciding whether to issue a preliminary injunction, a trial court weighs two interrelated factors: the likelihood the moving party ultimately will prevail on the merits, and the relative interim harm to the parties from the issuance or nonissuance of the injunction. [Citation.]" (*Hunt v. Superior Court* (1999) 21 Cal.4th 984, 999.) "The trial

---

[5] Under the rubric of this argument, Barstow also argued briefly that Leasing was trying to "re-write the [L]ease" by reinstating Jun as the tenant.

court's determination must be guided by a 'mix' of the potential-merit and interim-harm factors; the greater the plaintiff's showing on one, the less must be shown on the other to support an injunction. [Citation.]" (*Butt v. State of California* (1992) 4 Cal.4th 668, 678.)

"'Generally, the ruling on an application for a preliminary injunction rests in the sound discretion of the trial court. The exercise of that discretion will not be disturbed on appeal absent a showing that it has been abused. [Citations.]' [Citation.]" (*Hunt v. Superior Court*, *supra*, 21 Cal.4th at p. 999.)

"In reviewing an order granting a preliminary injunction, we do not reweigh conflicting evidence or assess witness credibility, we defer to the trial court's factual findings if substantial evidence supports them, and we view the evidence in the light most favorable to the court's ruling. [Citation.] To the extent the plaintiff's likelihood of prevailing on the merits turns on legal rather than factual questions, however, our review is de novo. [Citation.]" (*City of Corona v. AMG Outdoor Advertising, Inc.* (2016) 244 Cal.App.4th 291, 298-299.)

"On appeal, the party challenging the preliminary injunction has the burden of demonstrating it was improperly granted. [Citation.]" (*City of Corona v. AMG Outdoor Advertising, Inc.*, *supra*, 244 Cal.App.4th at p. 298.)

Barstow argues that the preliminary injunction was mandatory, rather than prohibitory, and therefore it is subject to stricter review on appeal. (See generally *City of Corona v. AMG Outdoor Advertising, Inc.*, *supra*, 244 Cal.App.4th at p. 299.) We need

not decide this issue, because the outcome would be the same in any event. "'[T]he principles upon which mandatory and prohibitory injunctions are granted do not materially differ. The courts are perhaps more reluctant to interpose the mandatory writ, but in a proper case it is never denied.' [Citation.]" (*Ryland Mews Homeowners Association v. Munoz* (2015) 234 Cal.App.4th 705, 712, fn. 4.)

IV

LIKELIHOOD OF PREVAILING ON THE MERITS

Barstow contends that, for various reasons, Leasing has not shown a probability of prevailing on the merits.

A. *Standing.*

Barstow contends that Leasing has no standing to enforce the terms of the Lease. It appears to concede that "Der Wienerschnitzel" is an intended third party beneficiary. It argues, however, that there is no evidence that Leasing either is, or has the same rights as, Der Wienerschnitzel.

"'Every action must be prosecuted in the name of the real party in interest . . . .' [Citation.] This is the person who possesses the right to sue under the substantive law involved; anyone other than a real party in interest lacks standing . . . . [Citation.]" (*City of Brentwood v. Campbell* (2015) 237 Cal.App.4th 488, 504.)

However, "[a] third party may enforce a contract that is expressly made for his benefit. [Citation.] The third party need not be named in the contract, but he has the burden to show the contracting parties intended to benefit him. [Citation.] Determining

this intent is a question of contract interpretation. [Citation.]" (*Cline v. Homuth* (2015) 235 Cal.App.4th 699, 705.)

"'When a trial court's interpretation of a written agreement is appealed and no conflicting extrinsic evidence was admitted, the interpretation of the contract is a question of law which we review de novo. [Citations.]' [Citation.]" (*Rancho Pauma Mutual Water Company v. Yuima Municipal Water District* (2015) 239 Cal.App.4th 109, 115.)

Clearly, the original parties to the lease intended to benefit the original "Franchisor." However, they evidently also intended, more broadly, to benefit any subsequent franchisor. After all, as a general rule, contract rights may be assigned; there was no apparent reason why the original franchisor could not assign its rights to a third party. Moreover, the original franchisor might go through all sorts of corporate reorganizations — particularly over the life of a 25-year lease. The very fact that the original parties used the brand name "Der Wienerschnitzel" and the generic "Franchisor," rather than the name of the entity that happened to be the franchisor in 2001,[6] shows that they intended to benefit the "Der Wienerschnitzel" franchisor at any given time, whoever that might be.

---

[6] Barstow claims that Franchise was "expressly identified" as the franchisor in the Mohans' franchise agreement. It also claims that Leasing did not come into existence until a year and a half after the execution of the Lease. However, the portion of the record that it cites provides no support for these claims (see Cal. Rules of Court, rule 8.204(a)(1)(C)), and we have not found any support for them elsewhere.

To suppose the opposite only goes to show how absurd it is. If the parties intended to benefit only the original franchisor, then if the franchisor changed, the tenant would lose its right to assign the Lease, because there would be no more "Franchisor" to consent to an assignment. Similarly, as the Lease also provided that the landlord consented to the Tenant's use of all signage that the "Franchisor" might prescribe, the tenant would lose the right to use any signage.

We therefore conclude that, when the Lease referred to "Der Wienerschnitzel" or "Franchisor," it meant the entity that was the Der Wienerschnitzel franchisor at any relevant time.[7]

Barstow also argues, however, that assuming any Galardi entity is the "Franchisor," within the meaning of the Lease, it is Franchise (or possibly Group) — not Leasing. Admittedly, the Galardi entities created some confusion on this point by divvying up the franchisor's rights and duties as between Franchise and Leasing. We are somewhat puzzled as to why Franchise did not, if only out of an excess of caution, join Leasing as a co-plaintiff in this action.

Barstow, however, never raised this particular argument in the trial court. Accordingly, the argument has been forfeited for purposes of this appeal. "'[I]t is fundamental that a reviewing court will ordinarily not consider claims made for the first time on appeal which could have been but were not presented to the trial court.' Thus,

---

[7] From here on, we will also use "Landlord" and "Tenant" to refer to the landlord and tenant, respectively, under the Lease at any given time.

'we ignore arguments, authority, and facts not presented and litigated in the trial court. Generally, issues raised for the first time on appeal which were not litigated in the trial court are waived. [Citations.]'" (*Newton v. Clemons* (2003) 110 Cal.App.4th 1, 11, fns. omitted.)

Finally, Barstow argues that Leasing cannot prove that a contract was formed, because it cannot show that Barstow agreed to give notice to Leasing, that the provision requiring notice to Leasing was clear, or that Leasing agreed to give Barstow something of value. This argument is confused in several ways. First, it confuses contract *formation* with the *terms* of the contract. Obviously, a contract was formed; not even Barstow is claiming that there was no Lease. Second, it confuses the parties to the contract with the third-party beneficiary. The third-party beneficiary does not have to give consideration; it is enough that the original parties gave consideration. (*Principal Mut. Life Ins. Co. v. Vars, Pave, McCord & Freedman* (1998) 65 Cal.App.4th 1469, 1489.)[8]

In sum, then, we conclude that the Lease required the Landlord to give notice to the Franchisor, whoever that might be at any relevant time. Barstow has forfeited any argument that the Franchisor was Group or Franchise rather than Leasing.

---

[8] Similarly, Barstow states: "[I]n order to recover damages from [Barstow] for breach of contract, [Leasing] must . . . prove [t]hat [Barstow] and [Leasing] entered into a contract . . . ." Not at all. Leasing need only prove that Barstow entered into a contract under which Leasing was a third-party beneficiary.

B. *Reinstatement of Jun*.

Leasing freely admitted below that it had no intention of operating the Wienerschnitzel on its own; rather, as long as the preliminary injunction was in place, Jun would be the one actually operating the restaurant.

Barstow argues that allowing Leasing to reinstate Jun results in an unauthorized assignment or subletting and thus effectively rewrites the Lease.

Plainly the Lease allows the Franchisor to cure a default so that it can operate the restaurant itself. In light of the assignment and subletting provisions, it also allows the Franchisor to cure a default so that it can assign or sublet — with the Landlord's consent — to a new tenant/franchisee. In our view, the question is, does the Lease also allow the Franchisor to cure a default for the benefit of the existing Tenant?

Leasing argues that the Lease has two separate provisions allowing the Franchisor to cure a default. First, subparagraph (e) of the "Franchise Provisions" states: " . . . Franchisor shall have the right to enter the Premises to make any modifications necessary to protect the Franchisor's Proprietary Marks or to cure any default under the Lease . . . ." (Capitalization altered.) Second, subparagraph (f) of the "Franchise Provisions" states: " . . . Franchisor shall have the option . . . to assume Tenant's occupancy rights, duties and obligations . . . upon Tenant's default or termination under this Lease; provided that as a condition to said assumption Franchisor shall cure Tenant's default." (Capitalization altered.) Leasing concludes that it "has the right to cure the default for Jun under subparagraph (e) . . . or the right to take over under subparagraph (f)."

Subparagraph (e), however, is ambiguous. Does it mean "Franchisor shall have *the right* [1] to enter the Premises to make any modifications necessary to protect the Franchisor's Proprietary Marks or [2] *to cure any default under the Lease*"? Or does it mean "Franchisor shall have *the right to enter the Premises* [1] to make any modifications necessary to protect the Franchisor's Proprietary Marks or [2] to cure any default under the Lease"? If the latter, then it does not provide a right to cure so much as a right to enter to enforce a separate right to cure. Thus, we do not resolve the issue on this ground.

Rather, we look to the very provision of the Lease that was breached — the provision giving the Franchisor a right to notice. The Landlord agreed to give notice to the Franchisor at the same time as it gave notice to the Tenant. Normally, if the Franchisor wanted to cure a default for the benefit of the Tenant, it could do so through the Tenant. For example, if it needed to bring the rent current, it could send the money through the Tenant. And if, as in this case, it needed to provide the Tenant's financial records, as a practical matter, it could do so with — indeed, only with — the help of the Tenant. From the Landlord's point of view, there would be no reason to know or even to care whether the Franchisor was involved.

Hence, while the Lease did not expressly give the Franchisor a right to cure for the benefit of the Tenant, the Franchisor's right to notice, when combined with the Tenant's right to cure, gave the Franchisor this right impliedly.

Barstow complains — at length and bitterly — that as a result of the preliminary injunction, it is yoked together in an unwanted contractual relationship with a tenant who defaulted, failed to cure, and had an unlawful detainer entered against it. It must be remembered, however, that this is all Barstow's fault. If it had given notice to both Jun and Leasing at the same time, as it should have done, Leasing would have cured in a timely manner; there would have been no unlawful detainer. Under the Lease, Jun's time to cure and Leasing's time to cure should always be the same. They diverged solely due to Barstow's breach. Thus, the preliminary injunction does not effect a prohibited assignment or subletting; it simply holds Barstow to its agreement.

C. *Failure to Provide Contact Information.*

Throughout its brief, Barstow makes much of Leasing's failure to provide contact information.[9] It argues that, as a result, Leasing waived and/or is estopped to assert its right to notice. Barstow also describes the failure to provide contact information as an "anticipatory breach" (capitalization altered); from its ensuing discussion, however, it appears to be thinking of impossibility (see Civ. Code, § 1511, subd. 2) and/or prevention of performance (see Civ. Code, § 1511, subd. 1).

There are two problems with these arguments.

---

[9] In this connection, Barstow also argues that Leasing should have amended the Lease so as to substitute its name as Franchisor. However, as we held in part IV.A, *ante*, Franchisor, within the meaning of the Lease, already encompassed Leasing. Leasing was not a party to the Lease, and even if it were, it could not force Barstow and Jun to amend it.

First, the Lease does not set forth the Franchisor's contact information and does not obligate the Franchisor to provide it. As Barstow itself argues,[10] it is not uncommon for a lease to include contact information for notices; however, the Lease here does not. The Franchisor was not a party to the Lease, so the Lease could not obligate the Franchisor to update its contact information. Hence, when Barstow's predecessors in interest promised to provide notice to the Franchisor, they necessarily also took it on themselves to obtain the Franchisor's current contact information. While this is slightly disadvantageous, it is not unconscionable or even particularly surprising. After all, Der Wienerschnitzel is a well-known brand, and the internet existed even in 2001.

Second, there was substantial evidence that Barstow could easily have obtained the necessary contact information. A simple Google search would have revealed that Group owns Wienerschnitzel and would have produced Group's contact information. In any event, we see no reason why Barstow could not simply have asked Jun. Indeed, it could probably have asked *any* owner of *any* Wienerschnitzel.

We therefore conclude that the trial court could properly find that neither waiver, estoppel, impossibility, nor prevention of performance was a defense.

---

10 In support of this argument, Barstow cites and quotes from paragraphs 6 and 11 of the declaration of its then-attorney, Brad S. Sures. Leasing, however, objected to these particular paragraphs, and the trial court sustained those objections. Barstow does not argue that this was error. Accordingly, we disregard these paragraphs.

D. *"Abrogat*[*ion*]."

Barstow argues that Leasing "abrogated" the Lease. While this argument is the opposite of clear, apparently Barstow means its performance was excused because Leasing and/or Jun breached the Lease.[11]

Leasing did not and could not breach the Lease. As discussed in part IV.A, *ante*, it was not a party to the Lease; it was only a third party beneficiary. A fortiori, it had no duties under the Lease. Admittedly, there could be *conditions* to the enforcement of the Franchisor's rights. For example, before the Franchisor could assume the Tenant's rights under the Lease, it had to cure the Tenant's defaults. However, Leasing introduced evidence that it did cure Jun's defaults.

Barstow lists some nine separate provisions of the Lease that Leasing supposedly "abrogated." However, it provides no discussion or analysis to support this conclusion. While we can guess why it is claiming that Leasing breached the assignment and subletting provisions of the Lease (see part IV.B, *ante*), we find its other claims of breach quite baffling. How, for example, could Leasing have breached the integration clause? How could *anybody ever* breach an integration clause?!? Accordingly, while we reject Barstow's claim of breach on the merits, we also reject it, separately and alternatively,

---

[11] In support of this argument, Barstow cites *Jeppi v. Brockman Holding Co.* (1949) 34 Cal.2d 11, 18 and *Howard S. Wright Const. Co. v. BBIC Investors, LLC* (2006) 136 Cal.App.4th 228, 243 — both dealing with anticipatory breach.

because Barstow has failed to support it with reasoned argument and citation to authority. (*Ramos v. Westlake Services LLC* (2015) 242 Cal.App.4th 674, 683.)

Jun, on the other hand, could and did breach the Lease. However, "breach or failure to perform by a party to a lease is not a defense unless the covenant broken was a condition precedent to performance by the party defending. [Citations.]" (*Kulawitz v. Pacific Woodenware & Paper Co.* (1944) 25 Cal.2d 664, 669.) The Landlord was obligated to send to the Franchisor copies of all notices sent to the Tenant; this necessarily included any notice of default, so the Franchisor could cure. It would make no sense for Jun's performance to be a condition of this obligation.

E. *Imputed Notice*.

Barstow claims that it did not breach the Lease because the Franchise Agreement gave Leasing the right to request information from Jun, and therefore any notice to Jun was "ostensible, if not actual" notice to Leasing.

Preliminarily, Barstow forfeited this argument by failing to raise it below. (See part IV.A, *ante*.)

Separately and alternatively, Barstow has also forfeited it by failing to support it with reasoned argument and citation of authorities. (See part IV.D, *ante*.)

Turning to the merits, the trial court could reasonably find that the conditions for imputed notice were not met. "'[N]otice of a fact to an agent is deemed to be notice of that fact to the principal as well.' [Citations.]" (*DuBeck v. California Physicians Service*

(2015) 234 Cal.App.4th 1254, 1263, fn. 6.) The Franchise Agreement, however, specifically provided that Jun was not Leasing's agent.

And finally, even assuming that Jun was Leasing's agent, Barstow made a contractual promise to give notice to the Franchisor. Obviously, this was meant to protect the Franchisor in case it did not obtain notice through the Tenant. Thus, it is clear that imputed notice was insufficient to satisfy Barstow's contractual duty; the Lease required actual notice.

F. *Res Judicata and Collateral Estoppel.*

Barstow argues that this action is a prohibited attempt to relitigate the issues in the unlawful detainer. Although Barstow never uses the terms, it cites authorities dealing with res judicata and collateral estoppel.[12]

Neither doctrine can apply unless Leasing was a party to — or in privity with a party to — the unlawful detainer. (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 985 [collateral estoppel]; *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896 [res judicata].) "The concept of 'privity' is highly dependent upon the facts and circumstances in each case, but generally '"involves a person so identified in interest with another that he represents the same legal right."' [Citation.] Moreover, the 'circumstances must have been such that the party to be estopped should reasonably have expected to be bound by the prior adjudication.' [Citation.]" (*In re Conservatorship and*

[12] Leasing claims that Barstow failed to raise this argument in opposition to the motion for preliminary injunction. Leasing is wrong.

Estate of Buchenau (2011) 196 Cal.App.4th 1031, 1041.) "' . . . If the interests of the parties in question are likely to have been divergent, one does not infer adequate representation and there is no privity. [Citations.] If the . . . party's motive for asserting a common interest is relatively weak, one does not infer adequate representation and there is no privity. [Citation.]' [Citation.]" (*Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Assn.* (1998) 60 Cal.App.4th 1053, 1071.)

Here, Leasing was not a party to the unlawful detainer. Moreover, Leasing was not in privity with any party. Leasing's rights under the Lease were significantly different from Jun's rights; indeed, as already discussed in part IV.D, *ante*, Leasing had rights even if Jun was in breach. The Franchise Agreement did give Leasing some limited control over Jun's day-to-day operations but not over Jun's conduct of the unlawful detainer.

Barstow argues that Barstow's failure to serve the 30-day notice on Leasing would have been a defense to the unlawful detainer; thus, Jun and Leasing had a shared interest in this issue. We disagree. The Lease provided that, in the event of a default by Barstow, Jun had certain specified rights, including the right to terminate the Lease, to offset her damages against the rent, or to file an independent action for damages or for any other legally available remedy. However, it did not provide that Barstow's performance in general was a condition precedent to Jun's performance in general. Thus, Jun could not have used the failure to give notice to Leasing as a defense.

In addition, Barstow notes that the attorney representing Leasing in this case also represented Jun in the unlawful detainer. However, he did so only briefly, after the judgment had already been entered. More important, there is no evidence that he was *already* representing Leasing. (He claims he was not..) Thus, this is not evidence that Leasing had any control over the unlawful detainer.

We therefore conclude that res judicata and collateral estoppel do not apply.[13]

V

IRREPARABLE INJURY

Barstow contends that Leasing has not shown irreparable injury.

A. *Additional Factual and Procedural Background.*

Robert Mathews, the general counsel of Leasing, testified: "The loss of the Jun's location in Barstow that has been continuously operating as a Wienerschnitzel restaurant for almost 14 years would have an immeasurable and irreparable impact on the reputation and perception of the brand within the Barstow community." In addition, the Jun's loss of the restaurant would have a negative impact on Galardi's[14] entire franchise system

---

[13] Unlawful detainer actions are entitled to calendar preference. (Code Civ. Proc., § 1179a.) In its brief, Barstow requests calendar preference on the theory that this action is a collateral attack on the unlawful detainer judgment.

We deny this request because it had to be made by way of a motion. (Cal. Rules of Court, rule 8.240.) We also deny it on the merits; the mere fact that Leasing, which was not a party to the unlawful detainer, is seeking relief that conflicts with the unlawful detainer judgment does not magically transform this action into an unlawful detainer.

[14] Earlier, Mathews had defined "Galardi" to mean Group, Franchise, and Leasing, collectively.

. . . . The closure of a single restaurant erodes customer trust in the brand and the quality of the goods offered and will likely cause other Wienerschnitzel franchisees to lose business and may impact Galardi's efforts to recruit new franchisees."

Barstow objected to this testimony as argumentative, lacking foundation, and misstating the evidence. The trial court overruled these objections.

B. *Discussion*.

"[W]hen the failure to grant preliminary relief creates the possibility of permanent loss of customers to a competitor or the loss of goodwill, the irreparable injury prong is satisfied. [Citation.]" (*Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.* (4th Cir. 1994) 22 F.3d 546, 552; accord, *BellSouth Telecommunications, Inc. v. MCImetro Access Transmission Services, LLC* (11th Cir. 2005) 425 F.3d 964, 970.) Barstow does not appear to argue otherwise.

Barstow does argue that Leasing may have a legal remedy "against Jun or the Mohans or the prior landlord . . . ." Leasing's claimed injury, however, results from Barstow's failure to give it notice, which made Leasing unable to cure (or to help Jun to cure) Jun's default. It is impossible to see how Leasing could have a claim for that injury against anyone other than Barstow. Moreover, injury to goodwill is deemed irreparable because it is hard to identify and hard to quantify. Even assuming Leasing has some other claim against some other parties (for example, Barstow suggests it should sue Jun for breach of the Franchise Agreement), the damages recoverable still would not remedy the goodwill injury.

Barstow also argues that Leasing's injury is "self-inflicted," because it results from Leasing's own failure to supervise Jun. Once again, Barstow has forfeited this argument by failing to support it with reasoned argument and citation of authority. (See part IV.D, *ante*.)

Separately and alternatively, this argument lacks merit. Assuming we understand it at all, it invokes the doctrine of avoidable consequences and the duty to mitigate damages. (See generally *Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 870-871.)

The Franchise Agreement gave Jun "full operational control of the Wienerschnitzel Restaurant . . . ." Jun was not Leasing's agent, and Leasing was expressly not liable for her debts. Admittedly, Leasing had considerable control over Jun's advertising, menu, décor, and hours. However, it did not have control over her financial affairs.

The Franchise Agreement did provide that "[Leasing] shall have the right to take any and all action [Leasing] deems appropriate to . . . verify [Jun's] performance of obligations in this Agreement, including but not limited to . . . inspecting records . . . ." It also provided that "[Jun] shall provide to [Leasing] financial or business information, relating to the . . . operation of [Jun's] restaurant, as may be reasonably requested by [Leasing]." Thus, Leasing had the right — but not the duty — to inspect Jun's books. There was no evidence that Leasing knew that Jun was in danger of breaching the Lease and thus no evidence that it had any reason to inspect.

Quite the contrary — precisely because Leasing had the right to receive all notices that Barstow sent to Jun, Leasing was entitled to assume that, if Jun was having any problem complying with the Lease, it would find out about it from Barstow. On this record, there is no evidence that Leasing failed to make some reasonable effort to avoid its own injury.

Barstow also argues that Leasing failed to introduce any "competent" evidence of irreparable injury. (Italics omitted.) Yet again, however, Barstow has forfeited this argument by failing to support it with reasoned argument and citation of authority. It does not cite any particular section of the Evidence Code and it does not argue that the trial court erred by overruling its objections.

In any event, the trial court could reasonably find that Mathews, as Leasing's general counsel, had sufficient personal knowledge to give this lay witness opinion, which was rationally based on his perceptions. (See Evid. Code, §§ 702, 800, subd. (a).)

VI

ISSUES RELATED TO THE UNDERTAKING

A. *Failure to Require a Timely Undertaking*.

Barstow contends that the preliminary injunction "should not have issued without the concomitant posting of an undertaking."

Subject to exceptions not applicable here (Code Civ. Proc., § 529, subd. (b)), "[o]n granting an injunction, the court or judge must require an undertaking on the part of the applicant to the effect that the applicant will pay to the party enjoined any damages, not

exceeding an amount to be specified, the party may sustain by reason of the injunction, if the court finally decides that the applicant was not entitled to the injunction." (Code Civ. Proc., § 529, subd. (a).)

Here, however, the trial court did require an undertaking; the injunction provided that it was not effective until an undertaking was filed. Moreover, Leasing did post an undertaking.

Barstow cites California Rules of Court, rule 3.1150(f), which, as relevant here, provides: "[W]henever an application for a preliminary injunction is granted, a proposed order must be presented to the judge for signature, with an undertaking in the amount ordered, within one court day after the granting of the application or within the time ordered." Here, however, by entering a preliminary injunction that was not effective until an undertaking was filed, the trial court effectively ordered that the undertaking be filed within a reasonable time, rather than within one court day. We cannot say that 15 days was not a reasonable time — particularly when Barstow never objected or otherwise raised this issue below.

We also note that, in its reply brief, Barstow states: "As for the appropriate remedy, reasonable minds can differ: At a minimum, the [preliminary injunction] was not effective until the posting date." Again, however, the preliminary injunction itself provided that it was not effective until an undertaking was filed. Also, Leasing has never accused Barstow of violating the preliminary injunction before the undertaking was

posted. Accordingly, even assuming the preliminary injunction went into effect before the undertaking was filed, and even assuming this was error, that error is now moot.

B. *The Amount of the Undertaking*.

Barstow argues that the amount of the undertaking was insufficient.

Code of Civil Procedure section 995.930 governs objections to a bond or undertaking given in an action or proceeding. (See Code Civ. Proc., §§ 995.020, subd. (a), 995.210, 995.910.) It provides:

"(a) An objection shall be in writing and shall be made by noticed motion. The notice of motion shall specify the precise grounds for the objection. If a ground for the objection is that the amount of the bond is insufficient, the notice of motion shall state the reason for the insufficiency and shall include an estimate of the amount that would be sufficient.

"(b) The objection shall be made within 10 days after service of a copy of the bond on the beneficiary or such other time as is required by the statute providing for the bond."

"(c) If no objection is made within the time required by statute, the beneficiary is deemed to have waived all objections except upon a showing of good cause for failure to make the objection within the time required by statute or of changed circumstances."

In order to avoid a waiver under Code of Civil Procedure section 995.930, subdivision (c), only substantial compliance is required. (*ABBA Rubber Co. v. Seaquist* (1991) 235 Cal.App.3d 1, 12-13.) Nevertheless, a party to be enjoined must object to the

amount of the undertaking in the trial court at *some* point, in *some* form, to avoid a waiver.

Here, Barstow's opposition to the motion for a preliminary injunction did not discuss or even mention the appropriate amount of the undertaking. Barstow did not object to the amount of the undertaking within 10 days after service, under Code of Civil Procedure section 995.930, subdivision (b). Finally, Barstow did not object to the amount of the undertaking below in any other way. (See *ABBA Rubber Co. v. Seaquist*, *supra*, 235 Cal.App.3d at pp. 9, 13.)

We therefore conclude that Barstow forfeited this contention.

VII

DISPOSITION

The appeal is dismissed. Each side shall bear its own costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

McKINSTER
J.

SLOUGH
J.